IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No.13633 of 2007
WITH
SPECIAL CIVIL APPLICATION No.18549 of 2007

For Approval and Signature:
HONOURABLE MR.JUSTICE D.A.MEHTA Sd/-

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	**NO**
2	To be referred to the Reporter or not ?	**NO**
3	Whether their Lordships wish to see the fair copy of the judgment ?	**NO**
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	**NO**
5	Whether it is to be circulated to the civil judge ?	**NO**

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BALMUKUND ATMARAM PATEL & 4 - Petitioner(s)
Versus
SHARADBHAI PREMAJI RAMI & 14 - Respondent(s)

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Appearance :
SPECIAL CIVIL APPLICATION No.13633 of 2007

MR GM JOSHI for Petitioner(s) : 1 - 5.
MR TUSHAR MEHTA for Respondent(s) : 1 - 13.
SERVED (N) for Respondent(s) : 14-15
SPECIAL CIVIL APPLICATION No.18549 of 2007

Appearance :
MR GM JOSHI for Petitioner(s) : 1 - 5.
MR TUSHAR MEHTA for Respondent(s) : 1 - 13.
SERVED (N) for Respondent(s) : 14-15

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
Date : 29/10/2007
COMMON ORAL JUDGMENT

(1) RULE in both the petitions. The learned advocates appearing for respective respondents are directed to waive service of Rule. The petitions are taken for final hearing and disposal today considering the narrow scope of the controversy.

(2) In both these petitions, the petitioners are common. In Special Civil Application No.13633 of 2007 respondent No.1 is an individual (hereinafter referred to as 'Sharadbhai') while respondent No.2 is a Co-operative Housing Society (the Society) wherein the petitioners, respondent No.1 and the remaining respondents are members. In so far as Special Civil Application No.18549 of 2007 is concerned, the only difference is that respondent No.1 is the Co-operative Housing Society while rest of the respondents and the petitioners are members of the said Society.

(3) It is an accepted fact that the petitioners are plaintiffs in Lavad Suit No.1154 of 2005,

which has been primarily filed against the respondent-Housing Society seeking a declaration that the Society may not permit any members of the Society from using the allotted plot of land and the superstructure put up thereon from being used for any other purpose, other than residence, with a further prayer that the Resolution dated 21.08.2005 be declared to be illegal. The Board of Nominees, after hearing the parties, granted interim relief vide order dated 22.06.2006, made below application Exh.6.

(4) Sharadbhai challenged the said order by way of Revision Application No.220 of 2006 before the Gujarat State Co-operative Tribunal (the Tribunal). The respondent Society also challenged the said order of Board of Nominees vide a separate Revision Application being Revision Application No.261 of 2006.

(5) Revision Application No.220 of 2006 has been granted by the Tribunal vide impugned order

dated 10.05.2007 holding that the order made by the Board of Nominees injuncting the parties, during pendency of the suit, from utilizing the property for non-residential use is bad in law and has been quashed and set aside. Similarly, vide order dated 13.06.2007, after referring to the earlier order, the Tribunal has allowed the Revision Application filed by the Society and quashed and set aside the order made by the Board of Nominees.

(6) On behalf of the petitioners Mr.G.M.Joshi, learned advocate, has assailed the impugned orders made by the Tribunal contending that the Tribunal has, at the stage of deciding whether interim relief was rightly granted by the Board of Nominees or not, virtually decided the suit even before the suit has gone to trial. It was submitted that by placing reliance on the Resolution of 21.08.2005 in preference to the earlier Resolution of 1991 the very resolution which is under challenge in the suit has been upheld. In effect, thus

rendering the suit infructuous. It was submitted that the petitioners have no difficulty if the suit is heard and decided at the earliest but till that point of time neither the Society nor any other defendant members must be permitted to undertake activities which would render the suit infructuous.

(7) On behalf of Sharadbhai and the Society Mr.Tushar Mehta, learned advocate, has submitted that the impugned orders made by the Tribunal are justified in law considering the fact that since 1979 on plot No.8 Sharadbhai has been permitted to make non-residential use of the property by putting up an office-cum-godown on Plot No.8. That similarly there are other plots on which various non-residential activities are being carried out, Plot No.16 being one of them, as recorded by the Tribunal. It was, therefore, urged that considering the location of the Society, the surrounding development, including commercial

use of various properties around the Society, the amended Gujarat Development Control Regulations (G.D.C.R.) as applicable, the impugned orders made by the Tribunal do not warrant interference. It was also submitted that majority of the members of the Society are of the view that clock cannot be turned back and considering the surrounding circumstances the members must be permitted to utilize the plots allotted to the members for commercial and/or such other purpose which may not be strictly residential. In this connection he has also invited attention to the resolution recorded on 26.10.2007 at the meeting of the general body held on the said day, namely, 26.10.2007 (annexed to the Affidavit in Sur-rejoinder) to support the submission that majority of the members of the Society are of the opinion that a member wishing to utilize the plot allotted to the said member should not be prevented from utilizing the same in the manner and the

purpose for which the member desires to use the plot. In support of the submission reliance has been placed on the decision of this Court in case of Satyanarayan B. Sharma & Ors. Vs. A.L.Dineu & Anr., 2004(2) GLR 1055, with special reference to Paragraph No.18 of the judgment.

7.1) An alternative submission was also made that in the event the Court was of the view that the impugned orders of the Tribunal were required to be interfered with, the Board of Nominees be directed to expeditiously hear and dispose of the pending suit, preferably within a period of 03 (three) months, considering the peculiar circumstances of the case.

(8) As can be seen from the impugned order of the Tribunal dated 13.06.2007 made in Revision Application No.261 of 2006 filed by the respondent-Society the Tribunal itself has taken note of the fact that in case if the majority of the members are inclined to amend

the Rules in light of the Town Planning Rules and the GDCR then there should be no objection and no case was made out for interference. The Tribunal has also taken note of the fact that though in Plot No.17 the Society has not granted any permission for either putting up any construction which may be commercial in nature or for using the plot for commercial purpose and the permission being only for construction of flats would not assist the case of the plaintiff-petitioners. Similarly, the Tribunal records that despite the fact that sub-plot No.16 is being used for a commercial purpose merely because no such permission has been granted would not make any difference. The Tribunal has also referred to the rent note executed for plot No.8 and drawn an inference that there was no prohibition for commercial use of the plot in question and such activities were being carried on by the members and permitted by the Society. For this purposes the Tribunal has also taken into

consideration the tax bills issued by the Municipal Corporation as well as bills for electricity consumption. Lastly, the Tribunal has relied on the aforesaid decision in case of Satyanarayan B. Sharma (supra) which has been pointed out by the learned advocate for the respondents.

(9) On going through the reasoning adopted by the Tribunal it becomes apparent that the Tribunal has failed to appreciate the scope of the proceedings before the Tribunal, namely, Revision Application. The Tribunal was only called upon to examine and decide as to whether the order made by the Board of Nominees on 22.06.2006 was justified or not. The Tribunal was not required to undertake an exercise to determine whether the suit was correctly filed or not. As recorded by the Tribunal itself an activity which the Society can undertake after amending its Rules / Bye-laws cannot be considered as a criterion for deciding the validity or otherwise of the

order made by the Board of Nominees even before the Rules are amended. Admittedly, the Rules are yet to be amended / made and that is what has been pleaded by the respondent-Society in its written statement filed in the suit. Hence, merely on the basis of a resolution user of the land of the society cannot be changed only because some of the plots are put to non-residential use without permission of the Society. It is not necessary to enter into any detailed discussion on this aspect of the matter as the suit is pending before the Board of Nominees and any observation made by the Court might prejudicially affect one or the other side. Suffice it to state that the approach adopted by the Tribunal at the stage when the litigation was brought before the Tribunal was not warranted considering the pendency of the suit. The Tribunal ought to have considered the question : what would happen if the plaintiffs ultimately succeed in the suit? :

and answered the said question. The Tribunal has failed on this count.

(10) In so far as Special Civil Application No.13633 of 2007 is concerned, the Revision Application filed by Sharadbhai, being Revision Application No.220 of 2006, has been allowed by the Tribunal again on the basis of what has been recorded in Resolution dated 21.08.2005 and other evidence which has already been discussed in the earlier part of this judgment. However, the Tribunal has failed to appreciate that in principal the Resolution dated 21.08.2005 was under challenge in the suit filed by the petitioners and, therefore, without there being any discussion or finding qua the validity of the said resolution, no relief could have been granted at the interim stage by relying on the very resolution which is under challenge in the suit. As to what would be effect of the resolution is an issue which is in dispute before the Board of Nominees and the Tribunal

could not have forestalled the decision in the suit even before the suit has gone to trial.

(11) In so far as the reliance on the decision of this Court is concerned, suffice it to state that the said decision principally has turned on its own facts as can be seen from the facts recorded in Paragraph Nos.3, 12 and 15 of the judgment. In the present case the Court has not thought it fit to enter into any discussion on merits of the issue, as recorded hereinbefore, so as to avoid causing any prejudice to either side as the suit is at large before the Board of Nominees.

(12) In the result, both the petitions are allowed. The orders made by the Tribunal on 10.05.2007 and 13.06.2007 are hereby quashed and set aside and the order made by the Board of Nominees on 22.06.2006 stands restored till disposal of the suit. Rule made absolute in aforesaid terms. There shall be no order as to costs.

(13) Registry to place a copy of this order in connected matter.

Sd/-
[D.A. MEHTA, J]

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